IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.1046 OF 1986

Dena Bank, a Body Corporate
constituted under the Banking Companies,
(Acquisition and Transfer of undertakings),Act V of
1970 and having to Central Office at
Maker Tower, Cuff Parade, Bombay
including branch office at Dena Bank House,
Hamam Street, Share Bazar, Fort,
Mumbai - 400 023.
...Plaintiffs.

Vs.

1. M/s. Super Dyestuff Industries,
a partnership firm, carrying on
business at Chhatrabhuj Niwas,
70 Garibdas Street, Vadgadi,
Bombay - 400 003.

2. Ranchhoddas Karsandas Rangwala
(since deceased)

2(a) Maltiben Mulraj Sampat,
Geeta Apartment, Block No.6,
1st floor, Plot No.166,
Opp. Garodia Nagar, Ghatkopar(E),
Mumbai 400 077.

2(b) Sarla Ranchhoddas Asher,
Rangwala Building, 1st floor,
73 Jayantilal Vaishnav Road,
Ghatkopar (W), Mumbai 400 086.
(Deleted as per order dated 27.1.2006)

2(c) Madhubala Pratapsingh Ved,
C/9, Mariwalla Block, Rajawadi,
Ghatkopar (E), Mumbai - 400 077.

2(d) Purshottam Ranchhoddas Asher,
Vindhyachal Building, Flat No.1301,
13th floor, Neelkanth Valley,
Rajawadi, Ghatkopar (East),
Mumbai- 400 077.

2(e) Kumudben Chandrasen Bhatiya,
Deepali, 150, Pendharkar College Road,

Opp. Usha Petrol Pump,
M.I.D.C. Dombivli (E), Dist.Thane.

2(f) Mukeash Ranchhoddas Asher,
Kailash Kiran, Bldg. No.1, Flat No.1,
Gr. floor, 21 Tilak road,
Ghatkopar (E), Mumbai - 400 077.

2(g) Shobha Mahendra Toprani,
1715/A. Diamond Bar Blvd.,
Diamond Bar, CA 91765 USA.

3. Prakash Ranchhoddas Rangwala,
Legal Heir & L.R. of Deft.No.2,
both Defendants 2 & 3
residing at Rangwala Building,
73, J.V.Road, Ghatkopar (W),
Bombay - 400 086.

Mr.Raj Patel i/by K.V. Aiyer for the Plaintiffs.
Ms. Shobha Pawar for Deft.Nos.2(a),2(c) and 2(f).

CORAM: A.S. OKA, J.
DATE : JULY 24,2007

ORAL JUDGMENT

1. This is a suit for recovery of an amount. According to the case of the plaintiffs, on the request made by the first defendant certain credit facilities were granted to the first defendant. The second and third defendants were partners of the first defendant firm at the relevant time. On the application made by the first defendant, the following facilities were granted by the plaintiffs to the first defendant.

1) Cash Credit Hypothecation facility to the extent of a sum of Rs.2,00,000/-.

2) Term Loan facility of Rs.3,50,000/-.

3) Term Loan facility of a sum of Rs.2,50,000/-.

4) Bills purchase D/A facility of tenor not exceeding 60 days to the limit of Rs.3/- lacs.

The first facility was granted against the Security of hypothecation of raw materials. The second facility was granted on the Security of equitable mortgage to be created in favour of the plaintiffs by deposit of title deeds of defendants' factory land and building at Rangwala Industrial Estate, 25, Adi Shankaracharya Marg, Bombay 400 083. The third facility was granted against the Security of hypothecation of plant and machinery of the first defendant-firm. The plaintiffs have referred to various documents executed by the first defendant.

2. During the pendency of the suit, second defendant expired. The defendant Nos. 2(a), 2(c), 2(d), 2(e), 2(f) and 2(g) and defendant No.3 have been shown as the legal representatives of the deceased defendant No.2.

3. The plaintiffs have pointed out by amending plaint that after filing of the suit, the security of plant and machinery was sold at the cost of Rs.50,000/- as per order dated 31st August,1990 passed by this court.

By an order dated 16th/17th June,1993 on a Notice of Motion taken out by the plaintiffs, an order of injunction was passed restraining the original defendants from in any manner disposing of, parting with possession, creating third party rights or alienating the land and factory building more particularly described in the Schedule to the Notice of Motion. A case is made out that the plaintiffs have incurred heavy expenses for payment to Security Agency M/s. Narendra & Co. in a sum of Rs.2,05,425/- which is recoverable from the defendants.

4. The plaintiffs by amending the plaint referred to last Will dated 30th August, 1997 executed by the second defendant. It is stated that Probate of the Will has been obtained. The plaintiffs have referred to contents of the Will executed by the second defendant and various legacies conferred by the said Will. It is pointed out that an immovable property at Ghatkopar (W) known as Rangwala building has been willed away to the newly added defendant Nos. 2(b) and 2(c) who have been already appointed as an executors of the last Will of the original defendant No.2.

5. It must be stated here that during the pendency of the suit the defendant No.2(b) expired and by order

dated 27th January,2006, the plaintiffs were permitted to delete the name of defendant No.2(b) as legal representatives of the deceased defendant No.2(b) were already on record.

6. The plaintiffs have placed reliance on various documents such as Term Loan Agreement dated 23rd June, 1983 executed by the original defendants whereby the defendants hypothecated in favour of the plaintiffs all movables, plant and machinery lying at the factory of the defendants and agreed to repay the amount due under two separate term loan accounts. In respect of the bills purchase D/A facility, the defendants executed a Demand Promissory Note dated 23rd June, 1983 for a sum of Rs.3,00,000/- and a Letter of Continuity dated 23rd June, 1983. According to the case of the plaintiffs, the defendants also executed Inland Bill form dated 23rd June,1983. The defendants also executed a separate set of documents by way of security for Cash Credit Hypothecation facility. According to the case of the plaintiffs, the defendants committed default in payment of outstanding dues. The plaintiffs have set out in the plaint various breaches committed by the defendants of the terms and conditions on which the aforesaid four facilities were granted by the plaintiffs.

7. The suit was contested by the first and third defendants by filing written statement. The said written statement has been affirmed by the third defendant. Various contentions have been raised in the said written statement such as failure of the plaintiffs to approach the court with clean hands. Various contentions have been raised regarding notices issued by the Municipal Corporation of Greater Mumbai. Lastly, it is submitted that the third defendant was not agreeable with the claim of the plaintiffs and it is stated that the plaintiffs should consider of accepting the principal amount as the first defendant is a registered small scale unit. It is contended that as the first defendant faced genuine problem from the Municipal Corporation, sympathy should be shown by the court. There is a written statement filed by defendant No.2(e). There is a separate written statement filed by defendant No.2(a) and 2(f). In the written statement filed by the defendant Nos. 2(a) and 2(f) it is contended that the said defendants have not received any property of the deceased defendant No.2 in their hands. It is contended in the written statement that the second defendant died on 11th October,1998. It is stated that the defendant Nos. 2(a) and 2(f) as well as defendant No.3 are children of deceased defendant

No.2. It is stated that the defendant No.2 and defendant No.3 each had 50% share in the first defendant firm. It is alleged that after demise of the second defendant, third defendant has taken away all the property and assets of the first defendant firm. It is contended that the second defendant has stated that the defendant No.3 will be liable to pay all the debts of the first defendant firm. It is contended that the legal heirs of defendant No.2 could not enjoy their share in the factory as well as in the immovable property as the same were completely encumbered and mortgaged in favour of the plaintiffs.

8. It is pointed out that the defendant No.2(c) surreptitiously and illegally sold a property known as Bharat Caffe Property to Satish Vitthal Shetty and Vaishali Vitthal Shetty by a Deed of Conveyance dated 10th February, 2003. It is stated that rest of the property of the deceased defendant No.2 was stated to be bequeathed to defendant Nos. 2(c) and Sarla Ranchhoddas Asher who died intestate at Bombay. It is stated that the share of said Sarla went into the hands of the defendant No.2(c).

9. The defendant No.2(e) has adopted the statements, contentions and submissions made by the defendant Nos.

2(a) and 2(f) and it is stated that the said defendant is not liable to pay the dues payable by the deceased defendant No.2.

10. The issues were settled on 16th February,2006 which read thus:

> 1. Whether the plaintiffs prove that the plaintiffs are entitled to suit claim of Rs.9,63,689.62 alongwith interest @ 18.5% on Rs.4,08,784.12 and @ 15.5% on Rs.5,54905.50?
>
> 2. Whether the plaintiffs prove that aforesaid claim is duly secured by hypothecation of goods being Di-Methyl Aniline, Di-Ethyl Aniline and Lithareo and other finished and semi finished products?
>
> 3. Whether the plaintiffs prove that the plaintiffs are entitled to sell the said hypothecated goods and recover the suit claim from the said sale of the material?
>
> 4. Whether the defendants, jointly and severally are liable to pay the dues of the plaintiffs as per the particulars of claim as mentioned in the Exh.E to the plaint?
>
> 5. Whether the defendant No.2(a) to 2(g) are liable as legal heir of defendant No.2 and 2(b)?
>
> 6. Whether defendant No.3 proves that plaintiffs are entitled to suit claim against them because of the closure of industry as mentioned in Para 2 and 3 of the written statement?
>
> 7. Whether defendant No.3 proves that defendant No.3 as a small scale unit is entitled to waiver of interest and plaintiffs are liable to accept only principal amount as mentioned in Page 5 of the written statement?

7. Reliefs, if any?

11. The plaintiffs have filed an affidavit in lieu of evidence of one Ghegadmal Vishnu Nathu, a Manager and Constituted Attorney of the plaintiffs bank. The plaintiffs also filed an affidavit of documents of said Shri.G.V. Nathu.

12. Mr. Phiroze Colabawalla was appointed as a Court Commissioner for recording the cross examination of the witness of the plaintiffs. The Court Commissioner has submitted his report dated 13th October,2006 recording therein that he held meetings on 29th August,2006, 13th September,2006 and 12th October, 2006. He stated that only the plaintiffs appeared in the meetings. The Commissioner has further recorded that on 12th October, 2006, the plaintiffs informed him that the notice has been served to the Advocate appearing for defendant Nos.2(a), 2(e) and 2(f) and the defendant No.3 refused to accept the service. Affidavit of service of notice was filed by the plaintiffs on 16th November,2006. None of the defendants have come forward to cross examine the witness of the plaintiffs. Therefore, cross examination was treated as closed and the suit was kept for hearing of arguments. Thus, the affidavit

in lieu of examination-in-chief of the plaintiffs' witness has gone unchallenged.

13. I have perused the affidavit in lieu of examination-in-chief of Shri.Ghegadmal Vishnu Nathu. The following original documents produced by the plaintiffs have been duly proved in the evidence of the said witness.

1) Power of attorney dated 25th November,1998;

2) Certificate of Registration dated 2nd September,2002 of the first defendant issued by Registrar of Firms;

3) A joint and several On Demand Pro-note dated 23rd June,1983 signed by the defendant Nos. 2 and 3;

4) A letter of Continuity dated 23rd June, 1983 signed by the defendant Nos. 1 to 3;

5) Agreement of Hypothecation dated 23rd June,1983 signed by the defendants;

6) Agreement dated 23rd June, 1983 signed by the defendants recording agreement to repay the amount due and payable under the term loan facilities;

7) A Demand Promissory Note dated 23rd June,1983 signed by the defendants;

8) Inland bill form signed by the defendants;

9) Letter of Continuity dated 23rd June,1983 signed by the defendants;

10) Office copy of the Advocate's notice dated 23rd September, 1985;

11) Statement of Account of the first defendant duly certified under the Banker's Book Evidence

Act,1891 in respect of Term Loan against Plant and Machinery, Term Loan against Land and Building and Cash Credit Hypothecation Account.

14. A receipt dated 26th September,1990 issued by plaintiffs to the Court Receiver records that the Court Receiver had paid to the plaintiffs a sum of Rs.50,415/- after deducting Court Receiver's costs and other expenses. A zerox copy of the Probate granted in respect of the last Will of the second defendant is also produced on record.

15. Thus, the entire suit claim and the liability of the first defendant and the original second defendant as well as the third defendant has been established by the plaintiff by the evidence of the said witness.

16. As regards the defence raised by the third defendant is concerned, allegations were made against the Municipal Corporation as various notices were issued against various properties. In fact, a contention has been raised that considering the difficulties faced by the first defendant, the plaintiffs should accept the principal amount. His case is that sympathy should be shown. In so car as the case made out by the defendant Nos. 2(a) and 2(f) as well as 2(e) is concerned, it is sought to be

contended that they have not received any property in their hands out of the property held by their predecessor deceased defendant No.2 and therefore, no decree can be passed against the said defendants. It is obvious that though the plaintiffs have established joint and several liability of defendant Nos. 1 to 3, the legal representatives of the deceased defendant No.2 will be liable only to the extent of the property, if any, received by the said legal representatives and they cannot be held personally liable. However, the third defendant will be liable as a partner of the first defendant to the extent of the full amount.

17. The plaintiffs have prayed for further interest at the agreed rates mentioned in the documents which are duly proved. Considering the nature of the transaction, the plaintiffs are entitled to further interest as prayed. Hence, I pass the following order.

ORDER

a) There will be a decree in terms of prayer clause (a), (b), (c) and (h) with modification that the liability of legal representatives of the Defendant No.2 i.e. the Defendant No.2(a), 2(c), 2(d), 2(e), 2(f) and 2(g) to satisfy the decree will be only to the

extent of estate, if any, received in their hands from the deceased defendant No.2. The defendants will be entitled to adjustment to the extent of a sum of Rs.50,415/- received by the plaintiffs from the Court Receiver by way of sale of the hypothecated property against the decretal amount as on 26th September, 1990.

b) Certified copy is expedited.

(A.S. OKA, J.)